

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2356 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed :
to see the judgment ?.
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

PEE GEE FABRICS PVT.LIMITED

Versus

STATE OF GUJARAT

Appearance:

MR AB MUNSHI for Petitioner
PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 10/05/1999

ORAL JUDGEMENT

Rule. Ms. Katha Gajjar, the learned APP waives
the service of Rule for the State of Gujarat. At the
request of both the learned advocates, the application is
taken up for hearing today itself.

2. By this application, the petitioner prays for
setting aside the order dated 22nd March 1999 passed by
the learned Metropolitan Magistrate, Court No.
18, Ahmedabad directing the Naroda police station to hold

investigation under Sec. 202 of the Criminal Procedure Code and report within 60 days and for a direction to inquire into afresh examining the complainant etc.

3. The petitioner is the complainant in Inquiry Case No. 20/99. He filed the complaint in the Court of the Metropolitan Magistrate, Ahmedabad qua the offences punishable under Sec. 406, 420 read with Sec. 114 of the I.P.C. It is not necessary to set out the facts in details. Suffice it to say that after the petitioner presented his complaint the learned Metropolitan Magistrate, without recording his statement on oath and undergoing necessary procedure, straightway ordered the Naroda police station to hold enquiry under Sec. 202 of Criminal Procedure Code. The petitioner could see that the order passed is not legal. Hence the present application is filed for the aforesaid relief.

4. If directly a complaint is filed before the Magistrate, whether the Magistrate can straightway pass the order, directing the concerned police officer to inquire into the case and report, is the point that arises for consideration. If the complaint is filed and the Magistrate on receipt thereof does not take the cognizance and prefers to postpone the issue of process he has either to inquire into the case himself or direct the investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground to proceed against the accused. As per Proviso (b) to Section 202 of Cri.P. Code if the complaint is not filed by a court, cognizance cannot be taken or order about investigation also cannot be made unless the complainant and witnesses present (if any) have been examined on oath under Sec. 200, Criminal Procedure Code. Such provision is made so that the Magistrate may have a chance to thoroughly understand the case for determining what to do further in the matter. In the case of Jit Singh, S/o. Panna Singh vs. Ayub Khan, S/o. Hussain Khan and Others - A.I.R. (29) 1942 Peshawar 61 it is made clear that if the Magistrate does not record the statement of the complainant on oath as required by the Proviso to Sec. 202(1) before he sends the complaint for inquiry his omission is an illegality and not merely an irregularity. The High Court of Madras in the case of P.N.S. Aiyar vs. K.J. Nathan - 49 Criminal Law Journal 554, has held that before the process is issued the complainant must be examined on oath. Omission to examine is the irregularity not curable at law. It is further held that examination of the complainant must be in consonance with the provisions of law applicable. If the complainant

merely states that whatever has been stated in the complaint hereinabove is true cannot be said to be the examination. This Court has also in the case of Shankerbhai Mathurbhai Patel & Anr. v. Ramanlal Vrajlal Patel & Anr. - 32 (1) [1991 (1)] G.L.R. 387 has likewise held clearly laying down that on a complaint when order is passed directing the case to be sent for investigation to the police without examining the complainant on oath and his witnesses if present, it amounts to contravention of Section 202, Criminal Procedure Code and that would render the order passed null and void. In all the above referred three decisions, what is made clear in view of Section 202 and 200, Criminal Procedure Code is that when the Magistrate directly receives the complaint from the person, it is incumbent upon him to first examine the complainant on oath and also the witnesses if present, and after such examination if he finds that cognizance is required to be taken he is free to take the cognizance and issue the process, or if he finds that the offence alleged is required to be investigated fully through the police or any other agency he thinks fit he may pass the order accordingly. In any case therefore either before taking the cognizance or for ordering the further investigation through the police or any other agency, examination of the complainant and witnesses if present, on oath is a must. The omission to examine is illegality and whatever order without examining the complainant and witnesses is passed will be null and void.

5. In the case on hand, on perusal of the certified copy filed at Annexure A, it appears clearly that the learned Metropolitan Magistrate passed the order directing the police to inquire without examining the complainant and witnesses present if any on oath. He has thereby set the provisions of Sec.202 set at naught. The order which he passed and challenged in this application is in view of above said law being illegal, is required to be quashed making it clear that it would be open to the Magistrate to record the statement of the petitioner on oath and also examine the witnesses if tendered, and then pass appropriate order.

6. For the aforesaid reasons, the application is allowed. The order of the learned Metropolitan Magistrate dated 22nd March 1999 directing the police officer of Naroda police station to inquire under Sec. 202 of the Criminal Procedure Code is hereby quashed and set aside. The learned Metropolitan Magistrate is directed to examine the petitioner on oath and also examine other witnesses if present undergoing the

procedure as per Sec. 200 & 202 if tendered, and then
considering the statement on oath he shall pass
appropriate order. Rule accordingly made absolute.

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(rmr).